

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ALEX AKLAGI</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>SPECIALTY HOSPITAL OF MID AMERICA</b>	)	
Respondent	)	Docket Nos. 1,035,755 & 1,035,756
	)	
AND	)	
	)	
<b>ESIS</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the November 10, 2009 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on February 9, 2010.

**APPEARANCES**

C. Albert Herdoiza, of Kansas City, Kansas, appeared for the claimant. Ryan Weltz, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties stipulated to the following:

1. Claimant's October 21, 2006 injury arose out of and in the course of his employment;
2. Claimant sustained a 15 percent functional impairment as a result of his work-related accident, although the dispute as to whether claimant had a 5 percent preexisting impairment (under K.S.A. 44-501(c)) remains and must be decided in this appeal;

3. Claimant sustained a 67 percent task loss as a result of his work-related accident; and

4. Respondent does not dispute the ALJ's factual findings with regard to claimant's permanent partial general (work) disability<sup>1</sup> for the period August 27, 2007 to January 16, 2008 (83.5 percent) and January 17, 2008 to December 31, 2008 (63 percent).

### ISSUES

The ALJ found that the claimant suffered an accidental injury arising out of and in the course of his employment with respondent on October 21, 2006 and awarded the claimant a 83.5 percent work disability from August 27, 2007 through January 16, 2008, followed by a 63 percent work disability from January 18, 2008 through December 31, 2008 and a 45.75 percent work disability from January 1, 2009 to May 15, 2009.<sup>2</sup> The ALJ went on to find that respondent was not entitled to a credit for any pre-existing condition as he believed the record failed to establish a ratable condition that predated claimant's injury.

The respondent requests review of the Award alleging that it is entitled to a credit under K.S.A. 44-501(c) for claimant's preexisting impairment to his low back. Respondent also contends the ALJ erred in calculating claimant's post injury wages from January 1, 2009 by failing to include the value of fringe benefits paid by his present employer, KU Med Center.

Claimant argues that the ALJ's Award should be affirmed in every respect.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this Order. Therefore, the

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<sup>1</sup> K.S.A. 44-510e(a)(commonly referred to as a "work disability")

<sup>2</sup> These percentages reflect a constant 67 percent task loss but a varying percentage of wage loss. There is no dispute as to the percentages of work disability up to January 2009, but once claimant became employed by KU Med Center (and began receiving fringe benefits), respondent contends claimant's post-injury average weekly wage increased and the ALJ erred in his calculation of the ultimate work disability findings.

Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein, except as specifically noted below.

Respondent does not dispute that claimant was injured while performing his normal work duties on October 21, 2006.<sup>3</sup> The primary issue in this appeal is whether claimant had a preexisting impairment that would entitle respondent to a credit under K.S.A. 44-501(c) and whether the ALJ properly calculated claimant's post-injury wages while he was working at KU. Respondent asserts that claimant bears a 5 percent preexisting impairment and that his post-injury wages at KU should include employer paid - fringe benefits, thereby lowering claimant's ultimate wage loss to 15 percent commencing January 12, 2009 which in turn decreases claimant's work disability to 41 percent.

### PREEXISTING IMPAIRMENT

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>4</sup>

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment be rated or that the individual be given formal medical restrictions. But it is critical that the preexisting condition actually constitute an impairment in that it somehow limits the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the *AMA Guides*<sup>5</sup> cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and

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<sup>3</sup> At the outset, this claim was pled as a single acute injury followed by a series of injuries continuing to claimant's last date of work with respondent. And while respondent initially disputed the existence of a series, at oral argument the parties agreed that claimant's injury on October 21, 2006 resulted in impairment and the existence of a series of accidents was no longer at issue or in dispute.

<sup>4</sup> K.S.A. 2006 Supp. 44-501(c).

<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

treatment must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

In this instance, both physicians diagnosed claimant's preexisting degenerative condition in his lower back. And both agree claimant's October 21, 2006 accident aggravated that condition. But it is uncontroverted that claimant has no prior history of medical treatment for low back complaints that predate his October 21, 2006 accident. He testified that he had not sustained any previous back injuries, nor experienced any back complaints before the accident that forms the basis for this claim. And while Dr. Pratt testified that he considered 5 percent (of his total 15 percent functional impairment assessment) constituted a preexisting impairment, the ALJ declined to grant respondent any credit under K.S.A. 44-501(c). He reasoned:

The Administrative Law Judge has specifically determined that claimant was asymptomatic regarding his low back condition prior to the event in October of 2006. Hence, claimant did not suffer a pre-existing impairment prior to the date of his occupational injury determined herein.<sup>6</sup>

The Board has considered the entire record and concludes the ALJ's conclusion is well founded and should be affirmed. There is no evidence that claimant had any low back complaints before his accidental injury. And while his spine may have shown evidence of a degenerative condition on the x-rays that were taken, just two days after the October 21, 2006 accident, under the applicable case law respondent is not entitled to any credit in this matter.<sup>7</sup> Moreover, Dr. Pratt, the only physician to assign any preexisting impairment, conceded that his opinion was based primarily on the x-rays and claimant's work history. He seemed to give absolutely no credence to the fact that claimant had no previous injuries or complaints and had never been diagnosed with any low back conditions. Rather, he relied upon the post-injury radiographic studies and the fact that claimant has been a nurse for a number of years. Under these facts and circumstances, the Board finds that respondent has failed to establish an entitlement to a credit under K.S.A. 44-501(c). The ALJ's Award is affirmed on this issue.

#### **CLAIMANT'S POST-INJURY AVERAGE WEEKLY WAGE**

At oral argument, the parties were able to isolate the issues and as a result, there is a single period of post-injury wages that remains in dispute. The parties' acknowledge claimant became employed at KU Med Center on a part-time basis in January 2009. Claimant testified that "as far as he knows" he pays 100 percent of the cost of his fringe

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<sup>6</sup> ALJ Award (Nov. 10, 2009) at 6.

<sup>7</sup> See e.g., *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

benefits.<sup>8</sup> Respondent produced some records and copies of a computer “screen” which confirms that claimant began his employment in January 2009, and that benefits began some time in February 2009. These same “screen” prints seem to suggest that the employer may pay something towards claimant’s health care. And although these records went in to evidence without objection, there is no explanation whatsoever of the meaning of these “screens”.

Claimant testified that it was his understanding that he paid the entire premium for his health care and these records confirm that his employer deducts significant amounts from his pay for his health care premiums. This question was asked a number of different ways and the answer was always the same. There is a cover sheet that confirms claimant’s hourly rate of pay, shift differential and the fact that he has elected to purchase insurance through his employer. These “screen” prints confirm at least a portion of his testimony, that he is paying for his insurance. And while there is a reference to an employer’s share of the fringe benefits, without some sort of explanation of the information contained within this screen, the Board is unwilling to take the evidentiary leap and conclude, based upon respondent’s argument, that claimant’s post-injury wage with KU nets him a 15 percent wage loss. The documents alone are not persuasive in light of claimant’s adamant testimony that he pays the entire premium. Accordingly, the Board finds that the ALJ correctly calculated the claimant’s post-injury wages at KU beginning January 1, 2009.

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<sup>8</sup> R.H. Trans. at 31.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated November 10, 2009, is affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant  
Gary R. Terrill/Ryan Weltz, Attorneys for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge